MALAYSIAN REPORTS

Dragon & Phoenix Bhd v Kesatuan Pekerja-Pekerja Perusahaan Membuat Texstil dan Pakaian Pulau Pinang & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-212-89
LEE HUN HOE CJ (BORNEO), HARUN HASHIM AND JEMURI SERJAN SCJJ
7 NOVEMBER 1990

Administrative Law — Jurisdiction — Certiorari — Award of Industrial Court — Application to enforce collective agreement — Industrial court interpreting collective agreement — Jurisdictional error — Industrial Relations Act 1967, ss 33 & 56

Labour Law — Enforcement function of Industrial Court under s 56 of the Industrial Relations Act 1967 and interpretation function of the court under s 33 of the Act — Difference between — Jurisdictional error on face of record — Industrial Relations Act 1967, ss 33 & 56

In this case the respondent trade union applied to the Industrial Court complaining that the appellant company had not complied with a collective award relating to the wages, terms and conditions of employment. In its award the Industrial Court purported to interpret the collective award and as a result of the interpretation ordered the company to give the employees 'one paid day-off or a day's pay in lieu'. The appellant company applied to the High Court for an order of certiorari to quash the award and when this was refused, they appealed to the Supreme Court.

Held, allowing the appeal:
The real issue before the Industrial Court was on the interpretation of a clause in the collective award. The respondent trade union ought not to have made a complaint under s 56 of the Industrial Relations Act 1967 alleging non-compliance when its interpretation of the award was disputed by the company. It should have applied to the court under s 33 of the Act for interpretation. There was therefore a jurisdictional error on the fact of the record and the learned judge ought to have issued certiorari to quash the award.

[Bahasa Malaysia summary

Di dalam kes ini kesatuan sekerja (responden) telah memohon kepada Mahkamah Perusahaan dan mengadu bahawa syarikat (perayu) telah tidak mematuhi kepada award kolektiff mengenai gaji, dan dengan peruntukan dan syarat pekerjaan. Didalam awardnya Mahkamah Perusahaan telah cuba mentafsirkan award kolektif itu dan selepas membuat demikian ia mengarahkan syarikat itu memberi kepada pekerjanya 'satu hari cuti bergaji atau gaji satu hari sebagai gantinya.' Perayu telah memohon perintah certiorari dari Mahkamah Tinggi untuk membatalkan award itu dan apabila permohonan itu ditolak, ia telah merayu ke Mahkamah Agung.

Diputuskan, membenarkan rayuan itu:
Issue sebenar di hadapan Mahkamah Perusahaan ialah diatas pentafsiran suatu peruntukan award kolektif itu. Responden tidak seharusnya membuat aduan dibawah s 56 Akta Perhubungan Perindustrian 1967 mengadu mengenai ketakpatuhan dimana tafsirannya mengenai award itu telah dipertikaikan oleh syarikat itu (perayu). Ia seharusnya memohon kepada mahkamah dibawah s 33 Akta itu untuk mentafsirkan award itu. Oleh kerana itu terdapat kesilapan mengenai bidang kuasa yang jelas dari rekod dan hakim yang arif sepatutnya mengeluarkan perintah certiorari untuk membatalkan award itu.]

Legislation referred to
Industrial Relations Act 1967 ss 33, 56

CV Das (*Andrew Saw Tsan Chuan* with him) for the appellant.
S Anthonysamy for the respondent.

Cur Adv Vult

Harun Hashim SCJ (delivering the judgment of the court): In Award No 364 of 1987 ('the first award'), the Industrial Court determined the wages, terms and conditions of employment of the Dragon & Phoenix Bhd, Penang ('the company'). The First Schedule to the Award provides (in so far as it is relevant):

> Article 14 — Working Hours
> Working hours for all employees shall be as follows:
> . . .
> (b) Factory and store
> 45 hours per week, excluding lunch breaks; with no tea break in the morning and afternoon; and
> (c) Factory and store working hours shall be as follows:
> 8 am to 12 noon; and
> 1 pm to 4.30 pm.
>
> Article 26 — Overtime
> . . .
> (4) Employees who are required to work for sixteen (16) hours or more in any one day due to emergency shall be granted a paid day-off the following day.

The company had to fulfil overseas orders and requested nine store workers to work on 29 December 1987 from: 8 am to 12 noon; 1 pm to 4.30 pm; and 4.30 pm to 12 midnight.

And on 30 December 1987 requested 13 packing workers to work from: 8 am to 12 noon; 1 pm to 4.30 pm; and 5 pm to 12.30 am the following day.

The workers from both sections were not given a paid day-off the following day. The company contended that the employees worked only 15 hours on the dates in question and were therefore not entitled to the benefit under art 26(4). The Penang & Seberang Prai Textile & Garment Industry Employees' Union ('the union') representing the company's employees, on the other hand, contended that the one-hour lunch break should be included in the calculation of the hours worked and therefore the employees had worked 16 hours to entitle them to the benefit of art 26(4).

The union complained to the Industrial Court under s 56 of the Industrial Relations Act 1967 that the company had not complied with art 26(4). The Industrial

Court in Award No 116 of 1988 ('the second award') agreed with the union and ordered the company to give the 22 employees 'one paid day-off or a day's pay in lieu'.

The company was not pleased with the second award and applied to the High Court for an order of certiorari to quash the award. The learned judge found that there was no jurisdictional error on the part of the Industrial Court. He agreed with the findings and the reasons given by the Industrial Court in respect of the second award and dismissed the application. Hence this appeal.

In a complaint of non-compliance with any term of a collective agreement or award under s 56 of the Industrial Relations Act 1967, the Industrial Court should, as a general rule, look at the terms of the contract by confining itself to within the four walls of the collective agreement or award and decide whether the term has or has not been complied with. It is a purely *enforcement* function. It should not embark on an expedition to examine the provisions of the Employment Act 1955 in order to determine the meaning of the term complained of unless there is a specific reference to it because to do so would invoke the *interpretative* function of the court under s 33 of the Industrial Relations Act 1967 which is an entirely different exercise from that under s 56. It is important to recognize the difference between these two functions of the court because failure to comply with an order under s 56 is an offence with penal provisions whereas there are no such consequences in respect of a matter dealt with under s 33. It is also important to separate the two functions in order to determine which particular jurisdiction the Industrial Court is exercising in any particular case. It may well be that in a dispute such as in the present case there should have been two separate applications to the court, the first under s 33 to invite the court to exercise its interpretative function and if there is still non-compliance, a second application for enforcement under s 56.

In the instant case, the matter came before the Industrial Court as a complaint of non-compliance with the first award under s 56 but the resulting second award is in substance an interpretative exercise with a detailed discussion on s 60A of the Employment Act 1955. It is clear therefore that the real issue before the Industrial Court was on the interpretation of art 26(4) of the award read with art 14. It follows that the union ought not to have made a complaint under s 56 alleging non-compliance when its interpretation of the terms of the first award was disputed by the company. It should have applied to the court under s 33 for interpretation. We accordingly find that there is a jurisdictional error on the face of the record and the learned judge ought to have issued certiorari to quash the award.

We would, however, add, in order to avoid further litigation, that there is really no ambiguity in the terms of the first award for the following reasons: Article 14 provides for 'Working Hours' of employees. It then proceeds to set out the working hours for factory and store employees from 8 am to 4.30 pm '*excluding lunch breaks*; with no tea break in the morning and afternoon'. These words should be given their ordinary meaning. By excluding the one hour lunch break, the total number of hours of work per day is 7½ hours and working 6 days a week this works out to 45 hours per work which is what art 14(a) prescribes. 'Working Hours' under the award meaning therefore, the actual hours the employees are at work. It follows that under art 26(4), the reference to 'work for sixteen (16) hours or more in any one day' means actual hours the employees were at work excluding meal breaks. In the same award (or collective agreement) the words used in the several terms should be given the same meaning unless expressly stated to be otherwise because if this is not done it will lead to confusion. On this interpretation, we find that the company was right in its contention that the store employees worked only 15 hours on 29 December. In our view, under art 26(4) the packing workers worked only 14½ hours on 30 December because 'day' in its ordinary meaning commences from midnight to midnight. The additional half hour was worked on 31 December.

We pause to observe that we are here not concerned whether working 16 hours or more a day in an emergency under art 26(4) contravenes any provisions of the Employment Act 1955. If it does, the remedy is to apply to vary the award under s 33 to remove the ambiguity. This emphasizes the point we averred to earlier, that such questions are not the appropriate subject-matter when dealing with a complaint under s 56.

For the reasons stated, we would allow the appeal with costs here and below to the appellants. The order of the learned judge is set aside and we order that certiorari be issued to quash Award No 116 of 1988 of the Industrial Court. The deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Ng Yook Woon, Andrew TC Saw & Co; Aziz Anthony & Co.*

Reported by *Prof Ahmad Ibrahim*